RHB Bank Bhd v Gunasingam a/l Ramasingam

HIGH COURT (KUALA LUMPUR) — SP NO D5-24-120 OF 2001
KANG HWEE GEE J
7 JANUARY 2002

Companies and Corporations — *Winding up — Injunction to restrain petition — Judgment in default obtained against plaintiff — Application by plaintiff to set aside judgment in default — Payment into court by plaintiff of judgment debt — Whether an injunction should be granted to restrain defendant from filing statutory notice and winding up petition against the plaintiff — Whether plaintiff was able to pay its debts*

This was an application by the plaintiff bank for an injunction to prohibit the defendant from filing a statutory notice under s 218 of the Companies Act 1965 ('the Act') to wind up the plaintiff based on a judgment sum of RM803,271.46 obtained by the defendant in default of appearance and from filing a winding up petition against the plaintiff under s 217 of the Act. The plaintiff had filed an application to set aside the judgment in default. Meanwhile, in anticipation that the defendant might attempt to enforce the judgment in default by issuing the statutory notice and proceeding to petition for winding up, the plaintiff, through its solicitors, wrote to the defendant to inform him that the plaintiff would be depositing the judgment sum into court pending its application to set aside the judgment. The letter also sought the defendant's confirmation that he would not file the statutory notice. The defendant did not reply to the letter.

Held, allowing the plaintiff's application:

(1) The defendant had not replied to the plaintiff's solicitors' letter seeking a confirmation that he would not serve the s 218 notice on the plaintiff pending its payment into court of the judgment sum. Further, in the defendant's affidavit, he did not deny that he would serve the statutory notice on the plaintiff and commence winding up proceedings against the plaintiff. It was therefore, perfectly legitimate for the plaintiff to assume that its right to operate its banking business was being threatened by the likelihood of the commencement of a winding up proceeding that would adversely affect its operation as a bank. That threat was sufficient for the plaintiff to apply for the injunctive relief (see p 498C–E).

(2) A creditor who petition the court to wind up a company under s 218(e) of the Act is not exercising his right in personam to execute a judgment debt against the company as he would in an execution proceeding, but is exercising his right in rem to claim against the assets of the company along with other creditors whom the company may be liable to upon being wound up. It follows that a court undertaking an inquiry whether a company should be wound up under s 218(e) of the Act is not bound to

enquire whether the company would pay the petitioner's debt but whether it is generally able to pay its debts to its creditors (see p 498C–F, H).

(3) Once a company has proven to the satisfaction of the court that it is not commercially insolvent, that is to say, it is capable of paying to all its debtors every sen in the ringgit, the fact that it would not pay the individual debt of the petitioner for whatever reason, is irrelevant in deciding whether a winding up order should be made (see p 499A–B).

(4) In the instant case, there was not the slightest doubt that the plaintiff was able to pay its debts. The fact that the plaintiff's manager had committed himself to deposit a cheque for the judgment sum pending the decision of the court to set aside the judgment in default, reinforced the plaintiff's ability to pay its debts (see p 499D–E).

(5) The High Court has the power to grant an injunction to restrain a petitioner from presenting a winding up petition pursuant to its inherent jurisdiction to prevent an abuse of its process and by virtue of s 50 of the Specific Relief Act 1950 (see p 499G).

(6) In deciding whether to exercise its jurisdiction to restrain a person from filing a winding up petition against the company, the court has to consider the statutory right of the person to present a petition on the one hand, as opposed to the right of the company to be protected from such unwarranted intrusion of its operation on the other. The appropriate test to consider in the instant case where a perpetual injunction was applied for is that unless the company can show that the petition was prima facie bound to fail, a company is not entitled to an interlocutory injunction. A company that has proven itself to be commercially solvent has the right to protect itself from being disturbed by a creditor's petition to wind it up. Further, a creditor choosing to enforce his right to a debt by petitioning for the winding up of a company must act bona fide in pursuant of such a right. A failure to do so is an abuse of the process of the court. A judgment creditor would not be acting bona fide if an alternative means of recovering his debt by a writ of seizure and sale under O 45 r 1(a) of the Rules of the High Court 1980 was available to him but he chose not to pursue it (see pp 499H–500A, E–F).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif, sebuah bank, untuk mendapatkan injunksi menahan defendan daripada memfailkan notis statutori di bawah s 218 Akta Syarikat 1965 ('Akta tersebut') untuk menggulung plaintif berdasarkan suatu penghakiman berjumlah RM803,271.46, yang diperolehi defendan secara penghakiman ingkar, serta memfailkan petisyen penggulungan terhadap plaintif di bawah s 217

Akta tersebut. Plaintif telah membuat permohonan untuk mengenepikan penghakiman ingkar tersebut. Sementara itu, di atas tangappan bahawa defendan akan cuba menguatkuasakan penghakiman ingkar tersebut dengan mengeluarkan notis statutori serta mengemukakan petisyen bagi penggulungannya, plaintif telah, menerusi peguamcaranya, menulis kepada defendan memberitahunya plaintif akan memasukkan jumlah penghakiman yang diperolehi defendan ke dalam mahkamah sementara menunggu keputusan mahkamah di atas permohonan plaintif mengenepikan penghakiman ingkar tersebut. Surat tersebut juga memohon kepastian bahawa defendan tidak akan memfailkan notis statutori. Defendan tidak membalas surat tersebut.

Diputuskan, membenarkan permohonan plaintif:

(1) Defendan tidak membalas surat peguamcara plaintif yang menuntut kepastian bahawa defendan tidak akan mengelurakan notis s 218 ke atas plaintif semetara menunggu pembayaran jumlah penghakiman ke dalam mahkamah. Lagipun, dalam afidavitnya, defendan tidak menafikan dia akan mengelurakan notis statutori ke atas plaintif dan meneruskan prosiding penggulungan terhadap plaintif. Oleh itu adalah sah bagi plaintif mengandaikan bahawa haknya meneruskan usursniaga perbankan diancam oleh kemungkinan prosiding penggulungan yang boleh memberi kesan buruk ke atas operasi banknya. Ancaman ini memadai untuk plaintif memohon relif injunksi (lihat ms 498C–E).

(2) Seorang pemiutang yang mempetisyen mahkamah untuk penggulungan sebuah syarikat di bawah s 218(e) Akta tersebut tidak menggunakan hak in personamnya untuk melaksanakan satu penghakiman hutang terhadap syarikat tersebut sepertimana dibuat dalam prosiding perlaksanaan, tetapi menggunakan hak in remnya untuk menuntut asset sebuah syarikat seiring dengan pemiutang lain syarikat tersebut apabila ia digulungkan. Seterusnya sebuah mahkamah yang menjalankan siasatan sama ada sebuah syarikat harus digulungkan di bawah s 218(e) Akta tersebut tidak wajib menyiasat sama ada syarikat itu akan membayar hutang pempetisyen tetapi sama ada ia secara am dapat membayar hutangnya kepada pemiutangnya (lihat ms 498C–F, H).

(3) Apabila sesuatu syarikat dapat meyakinkan mahkamah bahawa, daripada segi perniagaan, ia tidak insolven, iaitu ia dapat membayar kesemua pemiutangnya setiap sen dalam seringgit, kenyataan bahawa ia tidak akan membayar hutang pempetisyen di atas sebarang sebab adalah tidak relavan dalam menentukan sama ada perintah penggulungan harus dibuat (lihat ms 499A–B).

(4) Dalam kes ini, tidak terdapat sebarang keraguan bahawa plaintif dapat menjelaskan hutangnya. Kenyataan pengurus plaintif

membuat komitmen untuk mendepositkan cek bagi jumlah penghakiman sementara menunggu keputusan mahkamah mengenepikan penghakiman ingkar, menguatkan pandangan mahkamah bahawa plaintif dapat membayar hutangnya (lihat ms 499D–E).

(5) Mahkamah tinggi mempunyai bidang kuasa untuk memberi injunksi untuk menahan seorang daripada mengemukakan petisyen penggulungan di bawah bidang kuasa sedia adanya untuk mengelakkan penyalahgunaan prosesnya dan di bawah peruntukan s 50 Akta Relief Spesifik 1950 (lihat ms 499G).

(6) Dalam menentukan sama ada harus menggunakan bidang kuasa ini untuk menahan seseorang daripada memfailkan petisyen penggulungan terhadap sebuah syarikat, mahkamah harus mengambilkira hak statutori seseorang mengemukakan petisyen berbanding hak syarikat untuk dilindungi daripada masuk campur yang tidak wajar dalam operasinya. Ujian yang wajar dalam memastikan, dalam kes seperti ini di mana injunksi berkekalan dimohon, ialah kecuali syarikat tersebut dapat menunjukkan petisyen penggulungan secara prima facie sudah tentu akan gagal, sebuah tersebut tidak berhak untuk injunksi interlokutori. Syarikat yang dapat membuktikan bahawa, daripada segi perniagaan, ia adalah solven mempunyai hak untuk melindungi dirinya daripada diganggu oleh petisyen pemiutang untuk menggulung syarikatnya. Selanjutnya, pemiutang yang memilih untuk menggunakan haknya menuntut hutang dengan membuat petisyen penggulungan sebuah syarikat mesti bertindak bona fide semasa menggunakan hak ini. Kegagalan untuk membuat sebegini adalah satu penyalahgunaan proses mahkamah. Seorang pemiutang penghakiman tidak bertindak bona fide selagi ada cara alternatif untuk mendapatkan semula hutangnya melalui writ penyitaan dan penjualan di bawah A 45 k 1(a) Kaedah Mahkamah Tinggi 1980 diberikan kepadanya tetapi dia memilih untuk tidak menggunakan alternatif ini (lihat ms 499H–500A, E–F).]

Notes

For cases on injunction to restrain petition, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 883.

Cases referred to

A Company, Re [1915] 1 Ch 520 (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504; [1975] AC 396 (refd)

Bryanston Finance Ltd v de Vires (No 2) [1976] Ch 63 (refd)

International Tin Council, Re [1988] 3 WLR 1159 (refd)

Luggage Distribution (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 (refd) A
St Thomas Dock Co, Re (1876) 2 Ch D 116 (refd)

Legislation referred to

Companies Act 1965 ss 217, 218(e)
Rules of the High Court 1980 O 45 r 1(a) B
Specific Relief Act 1950 s 50

KK Wong (*Anita Ibrahim* with him) (*Lee Hishammuddin*) for the plaintiff.
Gunasingam a/l Ramasingam representing himself as the defendant.

Kang Hwee Gee J: By this application, the plaintiff RHB Bank Bhd C
(formerly United Malayan Banking Corporation Bhd) seeks an injunction to prohibit the defendant from filing a statutory notice under s 218 of the Companies Act 1965 ('the Act') to wind up the plaintiff based on the judgment sum of RM803,271.46 or part thereof obtained by the defendant in default of appearance, and to file a petition under s 217 of the Act to wind up the plaintiff based on the said judgment sum or part thereof. D

The grounds for seeking the injunction are set out in the supporting affidavit of its Pengurus Jabatan Tugas-Tugas Khas, Mohamed Din bin Dato' Seri Hamidi (encl 3) which may be summarized as follows:

The defendant had stood as a guarantor of a loan obtained by a person called Phee Ah Ang from the plaintiff's bank. Upon the said person E
defaulting in the repayment of the loan, the plaintiff commenced Civil Action No DI–23–937–87 against the defendant and after a full hearing obtained judgment for the sum of RM223,562.39 on 23 May 1995.

The defendant did not appeal against the judgment but some two years later, on 7 July 1997, filed an application to the Court of Appeal for F
extention of time to file an appeal and to reopen the case with leave to adduce further evidence therein. His application was, however, dismissed by the Court of Appeal.

Subsequently, the defendant was adjudged a bankrupt at the instance of the plaintiff on 3 July 2000 in consequence of his inability to pay the judgment sum. G

Earlier, on 23 February 1999, the defendant had commenced Civil Suit No D2–22–449–1999 against the plaintiff as a co-defendant with a person called DM Suppiah, a property valuer. In the suit the defendant alleged, inter alia, that they had committed fraud against him by issuing a false valuation of the land which was used as security for the loan in the Civil Suit No D1–23–937–87 for which the plaintiff had already obtained judgment H
for the sum of RM223,562.39.

The plaintiff failed to enter an appearance to the defendant's suit in consequence of which the defendant obtained a judgment in default of appearance on 15 March 2001. On 20 April 2001, the defendant served on the plaintiff a copy of the judgment in default of appearance which he I
obtained in Civil Suit No D2–22–449–1999.

The plaintiff has applied to set aside that judgment.

In anticipation that the defendant may attempt to enforce the judgment in default by issuing the statutory notice under s 218(1) of the Act and proceeding to petition for winding up, the plaintiff through its solicitors wrote to the defendant informing him that it would be depositing the judgment sum of RM803,271.46 into court pending its application to set aside the judgment. The letter also sought the defendant's confirmation that he would not in the meantime file the statutory notice. It read as follows:

> 26 April 2001
>
> MR GUNASINGAM s/o RAMASINGAM URGENT
> No 31, Jalan Helang 3,
> Bandar Puchong Jaya
> 47100 Puchong,
> Selangor Darul Ehsan.
>
> BY HAND/FAX NO: 03–5756143/ 57566149
>
> Dear Sir,
>
> IN KUALA LUMPUR HIGH COURT SUIT NO D2–22–449–99
> GUNASINGAM S/O RAMASINGAM v UNITED MALAYAN BANKING CORPORATION BERHAD & DM SUPPIAH
> We refer to the above matter where we act for RHB Bank Berhad.
>
> (2) We have been instructed by our clients that our clients have received a copy of the judgment in default dated 12 April 2001 entered against United Malayan Banking Corporation Berhad in respect of the above matter ('Default Judgment').
>
> (3) We have been made to understand that without prejudice to our clients' right in respect of the Default Judgment, our clients are in process of paying into Court a sum of RM803,271.46 and costs amounting to RM225.00 ('Payment into Court').
>
> (4) In view of the Payment into Court, we are hereby instructed by our clients to seek a written confirmation from you on an URGENT basis that—
>
> (a) you refrain from commencing execution proceedings in respect of the Default Judgment; and
> (b) you refrain from serving on our clients a statutory demand under s 218(2)(a) of the Companies Act, 1965 ('Statutory Notice') based on the Default Judgment.
>
> (5) If we do not obtain your written confirmation as requested in the aforesaid para 4 by 5:30 pm, Thursday, 26 April 2001, we have our clients' strict instructions to—
>
> (a) apply for a stay of execution of the Default Judgment; and
> (b) apply for an injunction to restrain you from presenting the Statutory Notice.
>
> Thank you.
> Yours faithfully,
> *For and on behalf of*
> LEE HISHAMMUDDIN
> Sgd
> for Wong Kian Kheong
> Direct line: 603–21658470

E-mail: wongkiankheong@leehishammuddin.com.my
c.c. clients

No reply was received from the defendant.

The defendant was not represented by counsel despite being advised to obtain one. Consequently, the two affidavits in reply which he filed to oppose this application were infirm of purpose. They failed to address the crucial legal issue whether the injunctive reliefs should be granted. Instead, they were directed to justify his locus standi as a bankrupt to commence the civil suit against the plaintiff and the validity of the judgment in default of appearance that he had obtained. These are matters which would not be relevant, unfortunately — for reasons which will be clear later in my judgment.

It is true the defendant did not indicate anywhere that he was not going to serve the s 218 notice with a view to commence winding up of the plaintiff. But he had also not replied to the plaintiff's letter (exh A–6 encl 3) seeking a confirmation from him that he would not serve the s 218 notice on the plaintiff pending its payment into court of the judgment sum of RM803,271.46, obtained by him. Neither did the defendant deny in his affidavit that he would serve a s 218 notice and commence a winding up proceeding against the plaintiff. It would therefore be perfectly legitimate for the plaintiff to assume that its right to operate its banking business was being threatened by the likelihood of the commencement of a winding up proceeding that would adversely affect its operation as a bank. That threat was sufficient for the plaintiff to apply for the injunctive reliefs.

A creditor who petitions the court to wind up a company under s 218(e) of the Act is not exercising his right in personam to execute a judgment debt against the company as he would in an execution proceeding, but merely his right in rem to claim against the assets of the company along with other creditors whom the company may be liable to upon being wound up. To quote Phillimore LJ in *Re A Company* [1915] 1 Ch 520 at p 528, a view affirmed by the Court of Appeal in *Re International Tin Council* [1988] 3 WLR 1159:

> In some general loose sense an unsatisfied creditor may be said to be enforcing his judgment by presenting a petition for a winding up. But, except that his judgment is evidence of his debt, a judgment creditor is in no better position for a winding up than any other creditor ...
>
> She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode which she no longer seeks to recover for herself alone but for the benefit of all the creditors ...

It follows that a court undertaking an inquiry whether a company should be wound up under s 218(e) is not bound to enquire whether the company would pay the petitioner's debt but whether it is generally able to pay its debts to its creditors.

It is significant to note that s 218(1)(e) of the Act speaks of the company being 'unable to pay its debts' as opposed to merely an unwillingness on its part to pay any isolated debt that it may owe to any creditor, although such

a refusal would attract the deeming provision in s 218(2) of the Act thereby placing upon the company the burden of proving that it is able to pay its debts. But once the company proves to the satisfaction of the court that it is not commercially insolvent, that is to say, it is perfectly capable of paying all its debtors every sen in the ringgit, the fact that it would not pay the individual debt of the petitioner for whatever reasons private or otherwise, is quite irrelevant when deciding whether a winding up order should be made. The judgment debtor must in such a case take his remedy elsewhere — properly this should be by way an execution on the asset of the bank or even for committal for refusing to obey the order of the court. As Jessel MR said in *Re St Thomas Dock Co* (1876) 2 Ch D 116 (at p 118):

> The petition ... may be, and probably is, presented with the idea of getting paid, not of getting paid under the winding up, but of getting paid by reason of the company not daring to meet the threat or risk of being wound up, which is I will not say an illegitimate use, but not the primary use of a petition for winding up of a company.

To return now to the instant case:

I will have to accept as true and accurate that the plaintiff's bank is not insolvent. The fact that its manager, Mohamed Din bin Dato' Seri Hamidi has committed himself to deposit a cheque for the judgment sum of RM803,496.46 pending the decision of the court on its application to set aside the judgment in default of appearance (which it had filed on 26 April 2000), reinforces its capability to do so. I have not the slightest doubt that the plaintiff is able to pay its debts.

Having decided that the plaintiff would be able to pay its debts, the question of whether the plaintiff is likely to succeed in setting aside the judgment in default of appearance obtained by the defendant in civil action D2–22–449–1999 is purely academic. So is the question of whether the defendant was legally competent to have initiated the civil action and obtained the judgment in default against the plaintiff without the prior approval of the official assignee. I do not therefore propose to deal with them in this application.

The power of the High Court to grant an injunction to restrain a petitioner from presenting a winding up petition is described by Stephenson LJ in *Bryanston Finance Ltd v de Vires (No 2)* [1976] Ch 63 at p 79C as 'a facet of its inherent jurisdiction to prevent an abuse of its process'. Here in our jurisdiction that power is not merely inherent but provided in clear terms in s 50 of the Specific Relief Act 1950.

In deciding whether to exercise that jurisdiction specifically to injunct a person from filing a winding up petition against a company, the court would have to consider the statutory right of that person to present a petition on the one hand against the right of the company to be protected from such unwarranted intrusion of its operation on the other.

Bryanston Finance has laid down the general principle that unless the company can show that the petition is prima facie bound to fail, a company is not entitled to an interlocutory injunction, a procedure which I would

accept as more appropriate and specific for the purpose — in preference to Lord Diplock's 'balance of convenience' in *American Cyanamid Co v Ethican Ltd* [1975] 1 All ER 504 at p 511, [1975] AC 396 at p 408. Moreover, that test (adopted and applied here in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719) is concerned with the grant of an interlocutory injunction whereas the injunction applied for in this instance is perpetual in nature albeit restrictive, respecting only the specific judgment in default obtained by the defendant.

I will have to accept the plaintiff's manager's averment that the service of the statutory notice under s 218 of the Act will adversely affect its banking operations involving some 182 branches in Malaysia with aggregate deposits of some RM34b and that it may cause a run on the bank in consequence of which the whole banking industry may be affected.

The effect that a winding up petition may bring to a company particularly a bank is obvious. One needs only to reflect on what Shankar J (as he then was quoting from *Buckley on the Companies Act 1948* (13th Ed)), said in *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58 at p 64 that:

> Great damage may obviously be done to a solvent company by a winding up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they bona fide believe they are not indebted. In such a case, on a writ issued by the company, an injunction will be granted to restrain the creditor presenting the petition.

A company that has proven itself to be commercially solvent, has the right to protect itself from being disturbed by a creditors' petition to wind it up. And if it can be determined that the petition is (to use the test in *Bryanstone Finance*) bound to fail, an injunction will lie. And to this may be added a rider. A creditor choosing to enforce his right to a debt by petitioning for the winding up of a company must act bona fide in pursuant of such a right. A failure to do so is an abuse of the process of the court. A judgment creditor will not be acting bona fide if a direct alternative means of recovering his debt by a writ of seizure and sale under O 45 r 1(a) of the High Court 1980 is available to him and he chooses not to pursue it. Provided there is a valid reason why that alternative means is not resorted to, it would be perfectly legitimate for the court to adopt the Bentham utilitarian approach to injunct the creditor from presenting the petition in order to prevent the company from suffering more harm than necessary.

There shall accordingly be an order in terms with costs.

Plaintiff's application allowed.

Reported by Lim Lee Na